U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

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FILE: EAC 04 036 50819 Office: VERMONT SERVICE CENTER Date: AUG 11 2005

IN RE: Petitioner: [redacted]
Beneficiary

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a information technology firm. It seeks to employ the beneficiary permanently in the United States as a programmer/analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence, including copies of a tax return and audited financial report for calendar year 2003, and information concerning expansion efforts undertaken during that same year.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on April 30, 2001. The proffered wage as stated on the Form ETA 750 is $34.03 per hour, which amounts to roughly $71,000 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked at the Mineola branch of the petitioning company since January 1999. The record does not reveal what financial ties exist between the different branches of the company.

On the I-140 petition form, the petitioner claimed to have been established in 1995, to have a gross annual income of $485,681 and a net annual income of $353,410, and to currently employ eight workers (a figure that would appear to refer only to the staff of the one branch, rather than the entire corporation). The petitioner indicated that the position offered to the beneficiary was a new position. In support of the petition, the petitioner claims to have submitted an "audited financial statement." The initial submission includes an "Independent Auditor's Report" for the nine months ending September 30, 2003, but the introduction to this report advises: "We have not audited the accompanying financial statements." Because the report was not audited, it does not meet the requirements set forth at 8 C.F.R. § 204.5(g)(2). The petitioner has also submitted copies of its corporate tax returns for calendar years 2001 and 2002. The documents contain the following information:

	2001	2002	2003 (partial)
Gross receipts	$271,315	$485,681	$1,168,726
Total income	217,609	353,410	746,489
Ordinary [net] income	8,580	3,429	203,299
Non-officer salaries and wages	58,529	53,461	180,235
Current assets	286,841	356,001	1,074,358
Current liabilities	495,004	555,104	897,130
Net current assets (liabilities)	(208,163)	(199,103)	177,228

The 2002 tax return shows that, when the petitioner reported its "net annual income" on the Form I-140, the sum provided was not the petitioner's income after expenses; rather, it was the petitioner's gross receipts minus cost of goods sold, *before* taking into account such basic deductions as salaries and taxes.

The petitioner's state and federal quarterly tax returns indicate $164,686 paid to 20 employees during the first quarter of 2003, $174,536 in wages paid to 25 employees during the second quarter, and $206,892.90 paid to 27 employees during the third quarter. These amounts substantially exceed the $180,235 claimed as the total wages paid for all three quarters on the 2003 auditor's report. The New York quarterly returns indicate that the petitioner paid the beneficiary $11,923.08 in the first quarter of 2003; $10,384.62 in the second quarter; and $12,115.39 in the third quarter. These amounts, labeled as gross wages rather than net wages after tax, are substantially lower than the proffered wage. At $34.03 per hour, the beneficiary should earn roughly $17,700 per quarter.

The director denied the petition, stating that the petitioner's low net income and net current liabilities in 2001 and 2002 indicate that the petitioner has not been able to pay the beneficiary's full proffered wage from April 30, 2001 onward. The director noted the petitioner's indication that the beneficiary's position was a new position.

On appeal, counsel states that the petitioner erroneously designated the beneficiary's position as new, whereas the beneficiary had been working for the petitioner since well before the date the Form ETA-750 was filed. Counsel states that the beneficiary "was being paid $48,000.00 . . . per annum." The burden is on the petitioner to show that it did, in fact, pay the beneficiary that amount, and that it had sufficient funds available to pay the balance of the full proffered wage.

Counsel argues that the petitioner's earnings in 2001 and 2002 were unusually low because the petitioner "expanded its business and made new investments," and because "business was not at its peak due to the all round economic situation in the market." Counsel states that business improved in 2003. *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), allows for consideration of petitions filed during uncharacteristically unprofitable or difficult years, but only in a framework of profitable or successful years. Counsel claims that 2001 and 2002 were uncharacteristically unprofitable for the petitioner, but the petitioner submits nothing from the preceding years to establish that the petitioner's low profitability in those years was, in fact, an aberration rather than a continuation of an established pattern.

Counsel states "at the time of filing the beneficiary was already an employee and earning an annual salary of $50,000 and in the year 2003 was paid $44,807." The 2003 figure is supported by a Form W-2 Wage and Tax Statement for 2003. The burden is on the petitioner to show, rather than *claim*, that it paid the beneficiary $50,000 in 2001 (the year of filing). Also, counsel's statement, on its face, indicates that, in 2003 (a year

when the petitioner is said to have "been doing good business"), the petitioner was not even able to pay the beneficiary $50,000, much less the full proffered wage in excess of $70,000.

As we have shown, counsel admits that the petitioner was unprofitable in 2001 and in 2002, and that the beneficiary received a significantly reduced salary in 2003 ($44,807 rather than $50,000). This indicates that, for three years in a row, the petitioner was not in a position to pay the beneficiary's full proffered wage. The record is devoid of evidence to show that these three years in a row interrupted a pattern of profitability that existed both before and after those years.

The petitioner submits a partial copy of its 2003 tax return, showing the following figures:

Gross receipts	$2,724,064
Total income (gross profit)	1,740,246
Ordinary (net) income	127,090
Non-officer salaries and wages	648,230

Schedule L, which lists assets and liabilities, is absent from the petitioner's submission. The petitioner submits an audited financial statement for 2003, which shows current assets of $2,285,837, well in excess of its current liabilities, which totaled only $635,059.

The audited financial statement indicates that the petitioner began calendar year 2003 with $846,806 in cash. This seems to conflict with the petitioner's 2002 tax return, which indicates that the company ended calendar year 2002 with only $77,922 in cash. The report, however, also indicates: "Before 2003, the various branches were independently incorporated under common ownership. As of January 1, 2003, all of the branches became part of one company." The timing of this merger would account for the sudden change in the petitioner's assets as of the beginning of the year. This change, however, has additional consequences for the outcome of the petition. For one thing, it undermines counsel's claim that the sudden upturn in the company's income demonstrates that business has improved. On the contrary, this increase appears to be explained by the combination of what had been the incomes of several independent companies.

The Form ETA-750B indicates that the beneficiary worked at the Mineola branch, not the Elmhurst branch (which has subsequently become the headquarters of the consolidated company, and retained the same Employer Identification Number shown on tax returns prepared prior to the consolidation). If the Mineola and Elmhurst branches were separate corporations in 2001 and 2002, as the audited report indicates, then the 2001 and 2002 tax returns of the Elmhurst branch do not include wages paid to the beneficiary in those years. The Elmhurst-based petitioner, rather than a commonly-owned but legally independent corporation in Mineola, must establish that it has been able to pay the beneficiary's full proffered wage from 2001 to date. Even if the petitioner had produced documentation to prove how much the beneficiary earned in 2001 and 2002, it would not suffice for the petitioner simply to establish that it could make up the difference between what the beneficiary received in Mineola and the full wage. The 2001 and 2002 tax returns of the Elmhurst branch do not show that the company had sufficient funds available to pay the beneficiary's full proffered wage.

Counsel observes that "two employees who were part-time and temporary non immigrant workers [who] were paid a total salary of $48,000.00 together have left the company." Counsel offers no evidence to support this claim, but even on its face, this does not, retroactively, make an additional $48,000 available to the beneficiary during 2001 and 2002. The wages in question have already been paid to those workers and are unavailable to pay to the beneficiary.

The petitioner did not pay any wages to the beneficiary during 2001 or 2002, and it paid substantially less than the full proffered wage in 2003. In 2001 and 2002, the petitioner shows a net income of less than $10,000 per year, and negative net current assets. The petitioner's net income suggests that the petitioner could have paid the full proffered wage in 2003, although the petitioner's failure to pay the entirety of the beneficiary's lower salary at the time raises questions that the petitioner has not answered. The petitioner has not, therefore, demonstrated that it has consistently had the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage in 2001 or 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.